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No. 99-1977

IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

vs.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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36 pp

QUESTIONS PRESENTED

1) Is the rule of *Graham* v. *Connor*, 490 U. S. 386 (1989) sufficiently particularized to be the relevant "clearly established" standard for determining qualified immunity in excessive force cases?

2) Must any officer who violates the *Graham* standard be also deemed to have violated a clearly established right for the purposes of qualified immunity?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondents has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Ninth Circuit in this case effectively ends the defense of qualified immunity in excessive force cases. This will increase officers' risk of litigation based upon the use of force, making law enforcement officers act more cautiously than public safety allows. This threat to public safety resulting from the Ninth Circuit's decision is against the interests CJLF was formed to protect.

For the foregoing reasons, *amicus* requests leave to file its brief.

December, 2000

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

As this case comes to this Court on appeal from denial of summary judgment, the question is whether the facts as alleged by plaintiffs would, if proven, defeat the defense of qualified immunity. On September 24, 1994, Vice President Gore gave a speech at the Presidio Army base in San Francisco, California, as part of a public event celebrating the conversion of most of the Presidio into a national park. *Katz* v. *United States*, 194 F. 3d 962, 965 (CA9 1999). At this time, animal rights activists were concerned that animal experiments were being conducted at the Army's Letterman Hospital. *Ibid.* Plaintiff Katz, a 60-year-old veterinarian, and other members of plaintiff In Defense of Animals (IDA) attended the event. *Ibid.* Katz sat at the front of the public seating area, which was separated from the stage and the dignitary seating area by a waist-high cyclone fence. *Ibid.* Katz, removing a banner from his jacket, moved towards the barrier as the Vice President started speaking. Katz

intended to hang the banner, which read "Please Keep Animal Torture Out of Our National Parks," over the fence so that the Vice President and other dignitaries could read it. *Ibid.*

In his deposition, Katz claimed that "a military police officer 'grabbed [him] from behind and somebody else tore the banner away' " before he could unfurl it. *Ibid.* Those two are the defendants Private Donald Saucier and Sergeant Steven Parker. *Ibid.* Saucier had been told by his superiors that demonstrations would not be allowed. *Ibid.* The two military policemen each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." *Ibid.* Katz was taken to a military van parked behind the seating area, and he claims that Saucier and Parker "violently threw" him inside the van. *Ibid.* Katz claimed "he was able 'to kind of prevent' his head from smashing into the floor of the van . . . ." *Id.*, at 965-966. "With a 'great deal of effort' he was barely able to prevent himself from getting seriously hurt.' " *Id.*, at 966. Katz claims he did not resist arrest, although Saucier disputes this. *Id.*, at 971.

The military police closed the van. Katz was left there for about 20 minutes, until the police put another IDA member in the van. Katz and the other member were then searched and handcuffed. *Id.*, at 966. Next, they were driven to the military police station, where they were briefly detained, and Katz was released. *Ibid.* Katz was not cited. *Ibid.*

Katz and the IDA filed suit "alleging multiple claims against the United States, a national park official, and various military officials." *Ibid.* Katz claimed that Saucier violated his First Amendment free speech right and violated the Fourth Amendment by arresting him without probable cause and with excessive force. *Ibid.* The District Court granted Saucier's summary judgment motions against the free speech and unlawful arrest claims on qualified immunity grounds. The transitional status of the base and the constitutionality of not allowing protests on military bases, see *infra*, at 22, and n. 4,

made Saucier's belief in the legality of the arrest reasonable. *Katz*, *supra*, 194 F. 3d, at 966. The District Court denied Saucier's motion on the excessive force claim, since " 'the qualified immunity inquiry is the same as the inquiry on the merits' " for excessive force claims. *Ibid.* The Ninth Circuit affirmed, following the District Court's reasoning. See *id.*, at 968-969. This Court granted the United States' certiorari petition on November 13, 2000.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, that an officer who violates *Graham* v. *Connor* is necessarily ineligible for qualified immunity under *Harlow* v. *Fitzgerald*, is incorrect. To understand why, it is important to first understand how *Harlow*'s objective standard advances its policy rationale. *Harlow*'s departure from the common law principles of official immunity was based on policy. Qualified immunity is primarily a means to reduce the high social costs of litigation against government officials. The defense is also fair, as it insulates officials from personal liability through sudden changes in the law. The key to qualified immunity is how these interests are advanced, while maintaining an individual's interest in vindicating his or her rights.

The Ninth Circuit's decision in this case effectively eliminates the qualified immunity defense in excessive force cases. Since it holds that *Graham* provides a clear legal standard for *Harlow* analysis, the law is never ambiguous in excessive force cases. This holding, when combined with the holding that an officer who violates *Graham* is *per se* unreasonable under *Harlow*, prevents an officer from successfully defending an excessive force case through qualified immunity.

Graham does not provide a sufficiently particularized legal standard for qualified immunity analysis. This Court's cases demonstrate that general standards, such as probable cause or the warrant requirement, are too abstract to provide sufficient

guidance for an officer in the field. Like other Fourth Amendment general standards, *Graham*'s balancing test is too abstract for a reasonable officer to know whether a particular use of force is legal. Instead, *Harlow* requires an examination of the cases applying *Graham* to a similar use of force in similar situations, which the Ninth Circuit did not do.

The Ninth Circuit's decision to equate the reasonable officer standards of *Graham* and *Harlow* is also incorrect. In part, this decision stems from a misdirected focus. The focus of any application of *Harlow* should be on determining whether the officer violated a legal standard that was clearly established at the time of the act. *Harlow*'s reasonableness standard flows from this determination.

More importantly, the *Harlow* and *Graham* standards involve different inquiries. *Graham* applies a balancing test to determine whether a use of force is appropriate, while *Harlow* examines the reasonableness of an officer's conclusion that an act was legal. Reasonable people can differ over whether a particular use of force is legal, as demonstrated by this Court's divided opinion in *Tennessee* v. *Garner*. No more can be expected of officers in the field. Therefore, an officer can violate *Graham* and still be entitled to qualified immunity.

Private Saucier's use of force did not violate any clearly established standards. The use of force in this case was minimal, causing no physical injury to the plaintiff. At least two circuits routinely grant qualified immunity in similar situations. Since this case also involves the security of the Vice President, deference to security officers is particularly important. Finally, the two cases cited by the Ninth Circuit to support the finding that Private Saucier acted unreasonably are readily distinguished as each involved much more force in a much less compelling situation than crowd control during the Vice President's speech.

The two-part analysis adopted by the Ninth Circuit is substantially different from this Court's precedents. If this

Court does decide to adopt this approach, it should make clear that this is a change in form and that no reduction in the degree of protection is intended.

ARGUMENT

I. Harlow's objective standard advances its policy rationale by protecting officials from liability due to the retroactive imposition of new standards.

This case provides an excellent example of how labeling can cloud analysis. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934) ("tyranny of labels"). The Ninth Circuit reasoned that since the standard for qualified immunity of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) and the standard for evaluating excessive force claims announced in *Graham* v. *Connor*, 490 U. S. 386 (1989) contained very similar language, an officer who acts unreasonably under *Graham* must also be deemed unreasonable for the purposes of *Harlow*'s objective standard. See *Katz* v. *United States*, 194 F. 3d 962, 968-969 (1999). Although linguistically similar, *Harlow* and *Graham* serve distinct purposes and accomplish their separate purposes through separate means. In order to understand why the qualified immunity issue is not the same as the Fourth Amendment reasonable force issue, it is first necessary to understand the policy rationale that forms the basis of this Court's qualified immunity decisions. These policies and the way *Harlow* advances them clearly distinguish the *Harlow* standard from *Graham*.

Although the defense of official immunity itself has strong historical roots, see *Owen* v. *City of Independence*, 445 U. S. 622, 638 (1980), modern qualified immunity law is driven by policy considerations. In *Harlow*, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law . . . ." *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987). "The transformation was justified

by the special policy concerns arising from public officials' exposure to repeated suits." *Wyatt* v. *Cole*, 504 U. S. 158, 170-171 (1992) (Kennedy, J., concurring); see *Crawford-El* v. *Britton*, 523 U. S. 574, 594, n. 15 (1998).

The *Harlow* Court's decision to replace the malice-based subjective inquiry found at common law with its objective "legal reasonableness" test, see *Anderson*, *supra*, 483 U. S., at 645, was justified by several policies. The most important reason for the change was minimizing the social costs of forcing public officials to defend against numerous damage actions. "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, *supra*, 457 U. S., at 806. The threat of suits against innocent officials has many social costs.

> "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.*, at 814.

These interests require that qualified immunity must be more than a mere shield against liability. In order to protect officials and society from the debilitating effects of unnecessary litigation, qualified immunity must stop insubstantial suits well before trial. A successful defense to liability at trial can be a Pyrrhic victory for the beleaguered government official. Trials, even successful ones, can be very expensive. Even reimbursement from the government does not end the official's troubles. "There is still a social stigma attached to being named a defendant in a lawsuit, especially if one is accused of violating someone's constitutional rights. Discovery may well bring out embarrassing facts unrelated to the lawsuit. Furthermore, the disruption, prying, and other aggravation makes the job more stressful." Note, Passing the Buck: The Supreme Court's

Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials from Frivolous Lawsuits, *Crawford-El* v. *Britton*, 118 S. Ct. 1584 (1998), 22 Harv. J. L. & Pub. Pol'y 1031, 1047 (1999).

An effective qualified immunity defense is not merely a defense to liability, but a means for avoiding litigation. The early termination of lawsuits is therefore an essential function of qualified immunity. See *Harlow*, *supra*, 457 U. S., at 814. This interest led this Court to abandon the common law subjective component of the defense. Since allegations of improper motive could rarely be decided on a summary judgment motion, the subjective element of the good-faith defense was dropped so that qualified immunity could resolve unsubstantial suits before trial. See *id.*, at 816-818. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526-527 (1985) (emphasis in original). Accordingly, this Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) (*per curiam*) (collecting cases).

Society's interest in avoiding burdening government officials with unnecessary trials does not exist in a vacuum. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, *supra*, 457 U. S., at 814. This must be balanced against the substantial social costs that can arise from suits against government officials. *Ibid.*; *Anderson* v. *Creighton*, *supra*, 483 U. S., at 638. How this Court strikes the balance is the key to understanding the scope of the defense. "Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to

have violated." *Anderson*, 483 U. S., at 638. That is, immunity is granted to officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow*, 457 U. S., at 818. This is an objective good-faith defense, centered on the status of the law at the time of the act. The *Harlow* standard does not require an examination of the act's reasonableness itself. Instead, it is only the official's conclusion that the act was legal that must be reasonable.

In addition to minimizing the social costs of suits against government officials, qualified immunity's objective standard is also fair. While "it is not unfair to hold liable the official who knows or should know he is acting outside the law," *Butz* v. *Economou*, 438 U. S. 478, 506 (1978), "officials will not be liable for mere mistakes of judgment, whether the mistake is one of fact or one of law." *Id.*, at 507. Government officials are subject to a vast, increasingly complicated set of federal constitutional and statutory restrictions. For example, the major legal treatise on the constitutional provision at issue in the present case runs to five volumes. See W. LaFave, Search and Seizure (3d ed. 1996). It is simply unreasonable to expect army privates or police to anticipate changes in the law. Therefore

> "focusing on 'the objective *legal* reasonableness of an official's acts,' [citation] avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to "know" that the law forbade conduct not previously identified as unlawful [citation].' " *Crawford-El* v. *Britton*, *supra*, 523 U. S., at 590 (emphasis added) (quoting *Harlow*, *supra*, 457 U. S., at 818, 819).

Harlow's reasonableness standard is ultimately a protection from liability due to the retroactive application of new legal standards or unanticipated applications of existing general standards. "The purpose of the doctrine of official immunity is to protect officials from legal surprises." *Nelson* v. *Streeter*, 16 F. 3d 145, 151 (CA7 1994) (Posner, J.). The *Harlow* standard

"gives ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341, 343 (1986). The defense thus gives officials a margin of error around all but clearly defined rights, a necessity in an increasingly complex legal environment. Cf. *Anderson*, *supra*, 483 U. S., at 644 (qualified immunity necessary to protect officers making often difficult Fourth Amendment decisions).

> "These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. '[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.' " *Davis* v. *Scherer*, 468 U. S. 183, 196 (1984) (quoting *Scheuer* v. *Rhodes*, 416 U. S. 232, 246 (1974)).

Since qualified immunity is derived from policy considerations, the defense must be interpreted in light of these policies. The official's margin of error must be preserved by paying careful attention to the state of the law at the time of the act. "This is not to say that an official action is protected by qualified immunity unless the very action has previously been held unlawful, [citation]; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson*, *supra*, 483 U. S., at 640. The court below did not follow the path set out by this Court. Its cursory examination of the relevant law, if upheld, would force many police officers into needlessly involved and expensive defenses against insubstantial claims. The Ninth Circuit's summary conclusion that Private Saucier's alleged acts would violate the Fourth Amendment's excessive force component is the type of surprise to officials that qualified immunity is meant to prevent.

II. The Ninth Circuit's decision incorrectly foreclosed the qualified immunity defense in excessive force cases.

The Ninth Circuit's decision, if upheld, would effectively eliminate the qualified immunity defense in excessive force cases. This conclusion is based upon an incorrect application of the qualified immunity standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) and the improper equating of the *Harlow* standard with the standard for Fourth Amendment reasonable force claims found in *Graham* v. *Connor*, 490 U. S. 386 (1989). Qualified immunity has a separate existence from *Graham*'s excessive force standard; a particular use of force can be excessive under *Graham* yet still be protected under qualified immunity if the legal status of that particular use of force was unclear at the time of the act. Contrary to the Ninth Circuit's reasoning, there is a margin of error in excessive force cases.

A. Eliminating the Defense.

Despite its claims to the contrary, the Ninth Circuit's decision eliminates qualified immunity as an effective defense in Fourth Amendment excessive force cases. The Ninth Circuit began its inquiry by dividing the *Harlow* standard into two parts.[1] First, a court was to ascertain whether the relevant law was clearly established. If the law was unclear, then immunity was granted. If the law was clear, then " 'we proceed to ask if under that law, a reasonable official could have believed that the conduct was lawful.' " *Katz* v. *United States*, 194 F. 3d 962, 967 (CA9 1999) (quoting *Somers* v. *Thurman*, 109 F. 3d 614, 617 (CA9 1997)). Next, the court summarized the reasonableness standard for evaluating excessive force claims set forth in *Graham* v. *Connor*, 490 U. S. 386 (1989). *Katz*, 194 F. 3d, at 967-968.

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1. This is incorrect, as the *Harlow* standard does not have two parts. See *infra*, at 17-18.

What followed is central to this case. Instead of determining whether *Graham* established a sufficiently clear standard under *Harlow*, it skipped to the reasonableness inquiry. Noting that both *Graham* and *Harlow* evaluated the reasonableness of the officer's conduct, the Ninth Circuit " held that 'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.' " *Id.*, at 968 (quoting *Alexander* v. *County of Los Angeles*, 64 F. 3d 1315, 1322 (CA9 1995)). From this followed the inevitable conclusion that unless the court could conclude that as a matter of law the level of force was reasonable under *Graham*, summary judgment was improper in excessive force cases. See *id.*, at 969.

Defendants do not have to prove that they acted legally in order to receive qualified immunity. The defense advances the policies that "officials should not always err on the side of caution." *Davis* v. *Scherer*, 468 U. S. 183, 196 (1984). Thus in a search case, an officer who reasonably, but mistakenly, concludes that he has probable cause is entitled to qualified immunity. See *Hunter* v. *Bryant*, 502 U. S. 224, 228-229 (1991) (*per curiam*). By eliminating the officer's margin of error, the Ninth Circuit eliminates the defense.

The decision asserts that qualified immunity is still available "when the law governing his or her conduct was not clearly established . . . ." *Katz*, *supra*, 194 F. 3d, at 970. Although the Ninth Circuit never explicitly stated what the clear legal standard was under *Harlow*, it must have concluded that some decision provided clear authority, since qualified immunity was denied to Private Saucier. Since the court equated the *Graham* and *Harlow* standards, *Graham* must be the clear legal standard that the Ninth Circuit used to deny immunity. This is consistent with circuit precedent implying that *Graham* is the clear standard. Compare *Headwaters Forest Defense* v. *County of Humboldt*, 211 F. 3d 1121, 1141 (CA9 2000), with *Graham*, *supra*, 490 U. S., at 396. Because *Graham* applies to every Fourth Amendment excessive force

case, the law will always be deemed "clear" in these cases if the decision below is upheld. The Ninth Circuit's promise of a still-existing qualified immunity defense in excessive force cases is a Potemkin Village. Thus, when denying qualified immunity on summary judgment in an excessive force case, a Ninth Circuit panel concluded, "The inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury *in rare cases*." *Headwaters Forest Defense*, 211 F. 3d, at 1140 (emphasis added). In reality, few, if any, defendants can satisfy the Ninth Circuit's standard, as the Ninth Circuit has all but admitted.

B. Too Abstract.

The first problem with the Ninth Circuit's analysis is that it defines the "clearly established statutory or constitutional rights," *Harlow*, *supra*, 457 U. S., at 818, at too high a level of abstraction. The Court's reliance on *Graham*, *supra*, for the appropriate legal authority for *Harlow*, see *supra*, at 11-12, contradicts this Court's treatment of qualified immunity in other Fourth Amendment contexts. In *Anderson* v. *Creighton*, 483 U. S. 635, 637 (1987), Anderson, an FBI agent, conducted a warrantless search of the Creightons' home because he believed that a suspected bank robber was hiding there. The Eighth Circuit held that the relevant legal standard under *Harlow* was the Fourth Amendment right to be free from warrantless searches of one's home absent exigent circumstances and probable cause, a clearly established right at the time of the search. *Id.*, at 638. The Court of Appeals concluded that qualified immunity was improper since the defendant violated this clearly established right. See *ibid.*

In reversing this decision, the *Anderson* Court demonstrated how courts should address this aspect of the *Harlow* standard. It noted that "[t]he operation of this [*Harlow*] standard, . . . however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.*, at 639.

Most constitutional rights are derived from very clear, but very abstract constitutional provisions. "For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Ibid.* Accepting this analysis would be the end of qualified immunity. "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability by alleging violation of extremely abstract rights." *Ibid.* This would transform *Harlow* into a mere "rule of pleading," destroying the careful balance between individual and societal interests. *Ibid.*

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 640.

While qualified immunity can be denied even when the specific action has not yet been held unlawful, the illegality still "must be apparent" under "pre-existing law . . . ." *Ibid.* In Anderson's case, this required deciding whether "it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances." *Id.*, at 640-641 (emphasis in original). Since "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," or that exigent circumstances exist, "in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.*, at 641. Therefore Anderson would be granted summary judgment if he could establish "that in light of the clearly established principles governing warrantless searches,

he could, as a matter of law, have reasonably believed that the search of the Creighton's home was lawful." *Ibid.*

This analysis is missing from the decision below. The Ninth Circuit did not address the vital issue of what are the relevant "clearly established principles" governing Private Saucier's alleged use of force with any depth. Instead, it operated under the assumption that *Graham* provided the appropriately clear law. See *supra*, at 11-12. Although relevant to the qualified immunity inquiry, the *Graham* standard is too abstract to provide the clear legal standard required under *Harlow*.

Graham provides the general framework for assessing whether a particular use of force is legal under the Fourth Amendment. This, like most general standards found in Fourth Amendment precedent, operates through a balancing test. Under *Graham*'s objective standard, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, *supra*, 490 U. S., at 397. Courts applying this test must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396. This judgment is made "from the perspective of the reasonable officer on the scene rather than with the 20/20 vision of hindsight." *Ibid.*

The relevant legal rules must be much more specific than this before they can provide *Harlow*'s clear standard. *Graham* governs every use of force that is regulated by the Fourth Amendment. Stating that the reasonableness of the use of force is determined by an objective balancing of the interests based upon the circumstances of the case is not by itself enough to put an officer on notice that a particular use of force is illegal. More is needed, like the cases applying *Graham* to specific uses of force. See, *e.g.*, *Soares* v. *State of Connecticut*, 8 F. 3d 917,

922 (CA2 1993) ("In the present case, the right in question is the right not to be handcuffed in the situation presented to the arresting officers"). Although a case on point is not necessary, there must be enough authority so that the unlawfulness of the act is obvious. See *United States* v. *Lanier*, 520 U. S. 259, 269-272 (1997).

Any doubt about the necessary level of specificity under *Harlow* was resolved in *Wilson* v. *Layne*, 526 U. S. 603 (1999). In that case, United States Marshals and local police allowed a reporter and photographer from the Washington Post to accompany them as they executed an arrest warrant in a private home. *Id.*, at 607-608. As in *Anderson*, the immunity issue turned on defining the relevant right specifically enough. See *id.*, at 614-615. Reiterating what this Court explained in *Anderson*, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*, at 615. The clearly established right must be very specific. "In this case, the appropriate question is the objective inquiry of whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." *Ibid.*

This type of inquiry has not yet been made in this case. In this case, the appropriate question is whether a reasonable officer in Private Saucier's position could have believed that the level of force he exerted was lawful in light of clearly established law and the information he possessed. Cf. *ibid.* The Court of Appeals did not answer that question correctly. See part III, *infra*.[2]

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2. At the end of its opinion, the Ninth Circuit concludes that "no reasonable officer could have believed that the amount of force [Saucier] used was lawful." *Katz*, *supra*, 194 F. 3d, at 970. It cited decisions from two other circuits to support this conclusion. See *ibid.* (citing *Sheth* v. *Webster*, 145 F. 3d 1231, 1238 (CA11 1998); *Alexis* v. *McDonald's*

C. The Reasonableness Trap.

The Ninth Circuit's errors in this case did not end with its choice of *Graham* v. *Connor* as the relevant legal standard for the qualified immunity analysis. See part II B, *supra*. It compounded its mistake by equating the reasonable officer standards of *Harlow* and *Graham*. See *Katz*, *supra*, 194 F. 3d, at 968. This position asserts that since an officer's use of force must be objectively unreasonable to violate *Graham*, then the officer cannot have acted reasonably to receive qualified immunity under *Harlow*'s objective standard. See *id.*, at 969. Although this position may have some surface appeal, this is "simplistic" analysis. See Eskow & Cole, The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness, 50 Baylor L. Rev. 869, 879 (1998). Focusing on the term "reasonable" to the exclusion of the differences between the *Harlow* and *Graham* standards is an analytical trap. Although both cases use this term, "reasonable" qualifies two different decisions made by the officer.

Before separating *Harlow* and *Graham*, it is necessary to address the manner in which the Ninth Circuit analyzed the qualified immunity question. The Ninth Circuit divides the *Harlow* test into two parts:

> "To determine whether an official is entitled to qualified immunity, we conduct a two-part analysis: (1) We consider whether the law governing the official's conduct was clearly established. If it was not clearly established, the official is entitled to immunity from suit. (2) If the law was

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Restaurants of Massachusetts, Inc., 67 F. 3d 341, 353 (CA1 1995)). Both cases are readily distinguished from the present case. See part III, *infra*, at 23-24. This analysis was made in rebuttal to Saucier's "fallback position" that the use of force "was so minimal that it was *per se* reasonable." *Ibid.* Such sparse analysis is not a proper determination of the relevant clear legal standard.

> clearly established, we proceed to ask if under that law, a reasonable official could have believed the conduct was lawful." *Katz*, *supra*, 194 F. 3d, at 967 (quoting *Somers* v. *Thurman*, 109 F. 3d 614, 617 (CA9 1997)).

Since it incorrectly assumed that *Graham* provided the clear standard to govern Private Saucier's alleged use of force, see part II B, *supra*, its discussion of *Harlow* and *Graham* was directed towards this "second prong of the qualified immunity defense . . . ." *Id.*, at 968.

The Ninth Circuit's analysis reflects its misplaced analytical priorities. The key question in virtually every qualified immunity case is determining whether the official violated a clear legal standard. Qualified immunity protects officials by preventing the retroactive application of new standards to their official acts. See part I, *supra*. Just as immunity flows from unclear law, liability follows the violation of clearly established standards. See *Harlow*, *supra*, 457 U. S., at 818-819. Therefore the existence of clear legal standards is inextricably linked to *Harlow*'s reasonableness standard. Barring a reasonable mistake of fact, see *Butz* v. *Economou*, 438 U. S. 478, 507 (1978), the violation of a clear legal standard leads to liability.

The Ninth Circuit's decision to bifurcate *Harlow* is thus incorrect. " '[C]learly established' for the purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Wilson*, *supra*, 526 U. S., at 614-615 (quoting *Anderson*, *supra*, 483 U. S., at 640). The Court of Appeals' attempt to distinguish *Anderson*, *supra*, as only addressing one "prong" is similarly incorrect. *Anderson* cannot be distinguished because it addresses the one and only "prong" of *Harlow*. See *Katz*, *supra*, 194 F. 3d, at 969-970, n. 4. Under *Harlow*'s indivisible standard, the established rule of law at the requisite level of specificity is the key question, which the Ninth Circuit failed to answer. See part II B, *supra*.

The *Anderson* Court confronted the relationship between Fourth Amendment reasonableness and *Harlow*'s use of that term. The fact that searches and seizures that violate the Fourth Amendment are "necessarily . . . *unreasonabl*[e]" did not foreclose qualified immunity for Fourth Amendment violations. See *Anderson*, *supra*, 483 U. S., at 643 (emphasis in original). The plaintiff's argument in *Anderson* was, "It is not possible . . . to say that one 'reasonably' acted unreasonably." *Ibid.* That argument was contrary to precedent, as qualified immunity had previously been extended to Fourth Amendment violations. See *ibid.* Furthermore, "the precise content of most of the Constitution's civil liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable . . . ." *Id.*, at 643-644. For the Fourth Amendment, as for these other provisions, a buffer zone is needed between the limit of government authority, as measured by "reasonableness," and the threshold of personal liability. Given the difficulty of determining whether a search or seizure is legal, officers who make objectively reasonable decisions regarding the legality of searches and seizures "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.*, at 644.

There is no reason to separate an officer's use of force from the rest of the Fourth Amendment for the purpose of qualified immunity. Like the rest of the Fourth Amendment, the *Graham* standard involves a "careful balancing" of individual freedom and government interests. See *Graham*, *supra*, 490 U. S., at 396. This "objectively reasonable" inquiry, see *id.*, at 397, is fundamentally different from what a court must decide under *Harlow*.

While the *Harlow* standard reflects a balancing of interests, see *supra*, at 7-8, there is no balancing when applying this test. Instead, *Harlow* examines the reasonableness of the officer's conclusion that the act was legal. Thus, where reasonably competent officials could disagree on the issue, then immunity

will be granted. *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). More importantly, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, *supra*, 526 U. S., at 618.

Since judges can and do disagree over whether a particular use of force is reasonable, it follows that an officer can reasonably but incorrectly conclude that a particular use of force is legal. As *Graham* requires a "*careful* balancing" of private and government interests, *Graham*, *supra*, 490 U. S., at 396 (emphasis added), it is inevitable that reasonable people will disagree over whether a particular application of force is legal under *Graham*. *Tennessee* v. *Garner*, 471 U. S. 1 (1985) demonstrates that reasonable judges can disagree over the propriety of the use of force in a particular case. While *Garner* predated *Graham*, it applied a similar balancing test. See *id.*, at 7-8; accord *Graham*, 490 U. S., at 396. While a majority of the *Garner* Court held that using lethal force against an unarmed, fleeing, nondangerous nighttime burglary suspect was excessive, see *Garner*, 471 U. S., at 11, three justices emphatically disagreed with this conclusion, finding a different balance of interests. See *id.*, at 26-30 (O'Connor, J., dissenting). In light of this split, and the officer's reliance on a previously valid Tennessee statute authorizing this use of force, see *id.*, at 4-5, it is no surprise that the *Garner* Court took pains to point out that none of the individual defendants would be held liable in that case. See *id.*, at 22. It is unfair to expect officers in the field to act with a unanimity that this Court cannot find.

It is unreasonable to hold officers personally liable for a use of force if they simply fail to guess which way the balance of interests eventually falls. Barring more specific, clearer guidance than *Graham*, officers can be immune from monetary damages even if the force is subsequently found to violate the Fourth Amendment. Since Private Saucier has not violated any clear standards regarding the use of force, see part III, *infra*, he is entitled to qualified immunity.

III. A reasonable officer could believe that the use of force alleged in this case was lawful in light of clearly established law.

One common characteristic of all excessive force claims is that they are almost always very fact specific. Each use of force is slightly different from the other except for the absolute of deadly force. Similarly, each arrestee will differ from the next, as will the circumstances surrounding the arrest. Therefore, determining the legality of a particular use of force "requires careful attention to the facts and circumstances of each particular case . . . ." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989). This leads to a very idiosyncratic body of law, with each case turning on its own particular set of facts.

Fortunately, qualified immunity does not turn on finding a case on point. "This is not to say that an official action is protected by qualified immunity unless the action in question has previously been held unlawful, [citation]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). Looking to cases involving similar uses of force in comparable situations, the illegality of Private Saucier's actions was not apparent in light of the law as it stood on September 24, 1994.

The reasonableness of Private Saucier's legal conclusions is derived from two facets of the encounter. First, the amount of force involved is rather small. Katz merely alleges that Saucier and another officer grabbed him, tore the sign from his hands, gave a type of "bum's rush" and then " 'violently threw' him inside" the van. *Katz* v. *United States*, 194 F. 3d 962, 965 (CA9 1999). Although Katz claims that it took considerable effort to keep himself from being seriously hurt when he was thrown into the van, see *id.*, at 965-966, the fact remains that he suffered no real harm and that the authorities used little real force against him. Two circuits routinely grant qualified immunity in cases of "de minimis" force and little, if any, actual injury. See *Curd* v. *City Court of Judsonia, Arkansas*, 141 F. 3d 839, 841 (CA8 1998); *Nolin* v. *Isbell*, 207 F. 3d 1253,

1255-1257 (CA11 2000). If an officer can make an arrest, then he or she has the right to use at least some force. "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, *supra*, 490 U. S., at 396. " 'Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers,' [citation], violates the Fourth Amendment." *Ibid.*

While a lack of substantial injury may not be dispositive, see *Wilks* v. *Reyes*, 5 F. 3d 412, 416 (CA9 1993), it is highly relevant to the reasonableness of the use of force. See *Meyer* v. *Robinson*, 992 F. 2d 734, 739 (CA7 1993) ("no injury gives weight to the assertion of no excessive force"). The fact that there was no actual harm, when coupled with the minimal force involved, strongly favors the reasonableness of the use of force.

A second factor supporting qualified immunity is the need to protect the Vice President. Sadly, experience teaches us that highly visible public officials are subject to a real risk of harm during public appearances. Although the President is the most obvious target, other prominent figures can face real danger at public events. See, *e.g.*, *People* v. *Sirhan*, 7 Cal. 3d 710, 718, 497 P. 2d 1121, 1125-1126 (1972) (assassination of Senator Kennedy), overruled on other grounds, *Hawkins* v. *Superior Court*, 22 Cal. 3d 584, 593, 586 P. 2d 916, 922 (1978).

Those who protect our highest officials must be allowed to react quickly to any potential threat. Presidents Reagan and Ford both narrowly averted assassination because of the rapid reaction to the threats by security officials. See E. Magnuson, *Six Shots at a Nation's Heart*, Time, April 13, 1981, at 26-29 (Reagan); *The Girl Who Almost Killed Ford*, Time, Sept. 15, 1975, at 10-11 (Ford). Therefore, while the interest in protecting the President is paramount, see *Hunter* v. *Bryant*, 502 U. S. 224, 229 (1991) (*per curiam*), officers should have similar freedom to protect the nation's second highest constitutional officer through crowd control.

Even though Katz alleges that he clearly posed no direct threat to the Vice President, it is still necessary to view Private Saucier's actions in light of very real security concerns. Maintaining crowd control is an essential element of protecting public speakers like the Vice President. Although the demonstrators themselves may not intend to harm the speaker, certain types of public demonstrations can divert the attention of security officials from greater threats.[3] Private Saucier was given a valid order that demonstrators would not be allowed on the Presidio,[4] and that he should diffuse such situations without drawing more attention than necessary. *Katz*, *supra*, 194 F. 3d, at 965. Katz started moving towards the barrier, just as the Vice President started to speak. While Katz only removed a banner from his jacket, *ibid.*, Saucier necessarily had little time to react. Private Saucier must be allowed to use some force to quickly remove such a disruption from the scene before something far more threatening could have developed.

The Ninth Circuit concluded that "[f]rom all that appears at this stage of the case, he [Katz] did not pose an immediate threat to the safety of the officers or anyone else." *Id.*, at 970. This is the type of judicial second-guessing of an officer in the field that *Graham* forbids. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, *supra*, 490 U. S., at 396-397. Private Saucier cannot

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3. *Amicus* does not imply that security officials are given carte blanche when dealing with such demonstrations. Protecting public demonstrations comes under the First Amendment, and Private Saucier was granted qualified immunity on the First Amendment claims. See *supra*, at 2.

4. Cf. *Greer* v. *Spock*, 424 U. S. 828, 838 (1976) ("no generalized constitutional right to make political speeches or distribute leaflets" on a military base).

consult the federal reports or Professor LaFave's treatise before making up his mind.

The Ninth Circuit itself recognizes that some force is necessary to disperse illegal demonstrators. In *Forrester* v. *City of San Diego*, 25 F. 3d 804, 805-806 (CA9 1994), San Diego police used "pain compliance techniques" to disperse anti-abortion protesters who refused to stop blocking access to medical clinics. The Court upheld a jury's finding of reasonable force. It first noted that the force used here "was less significant than most claims of force. The police did not threaten or use deadly force and did not deliver physical blows or cuts." *Id.*, at 807. Instead, they inflicted pain through "physical pressure administered on demonstrators' limbs in increasing degrees . . . ." *Ibid.* Given the legitimate government interest in maintaining order and protecting public safety, this use of force was reasonable. *Ibid.* The fact that dragging and carrying protesters may have been more reasonable was irrelevant. See *id.*, at 807-808.

While not identical to this case, *Forrester* illustrates the reasonableness of what Private Saucier did. The present case does involve fewer protesters, but much less force is involved in this case than in *Forrester*. Furthermore, this case involves the special security concerns surrounding the Vice President. *Forrester* may not make Private Saucier's legal conclusions correct, but it makes them more reasonable.

The two cases cited by the Ninth Circuit to support its conclusion that Private Saucier acted unreasonably, see *Katz*, *supra*, 194 F. 3d, at 970, are readily distinguishable. *Sheth* v. *Webster*, 145 F. 3d 1231 (CA11 1998) involved a dispute between the plaintiff, a landlord, and officer Webster over whether Sheth should return some money to one of her tenants. See *id.*, at 1234. After being contradicted by Sheth, Webster committed an unprovoked assault against her. This included repeatedly pushing her to the point that "plaintiff cried to Webster that he was hurting her. According to one witness, he kneed the plaintiff in the stomach. Sheth fell back against a

Coke machine five to twelve feet from where she stood." *Ibid.* After that, Officer Webster handcuffed her by one arm and dragged her to his car, eventually shoving her inside. *Ibid.* At one point, "[p]eople around began to shout at Webster to stop, that he was hurting her." *Ibid.* This is a far cry from the minimal, injury-free force used to help maintain crowd control around the Vice President.

Alexis v. *McDonald's Restaurants of Massachusetts, Inc.*, 67 F. 3d 341 (CA1 1995) is similarly distinguishable. In that case, the plaintiff, who was asked to leave a McDonald's after a dispute with the management, was "pulled from the booth, and across the table, *with sufficient force to bruise her legs*, then handcuffed with her hands behind her back and dragged and carried into a police cruiser and pushed inside." *Id.*, at 353 (emphasis added). Once again, the force is greater, and the threat smaller than in this case.

It is not necessary that Private Saucier's actions were clearly legal at that time. Instead they must merely be not clearly illegal. The force employed by Private Saucier allowed a speedy removal of Katz from the Vice President's presence. Given the minimal force employed, the lack of harm to Katz, and the heightened security interests, a reasonable officer could conclude that Private Saucier acted lawfully. He should not be hamstrung by judicial second-guessing.

IV. If the Court does adopt the Ninth Circuit's two-part test, adjustments are necessary to maintain the current level of qualified immunity protection.

As noted earlier, this Court's immunity cases to date do not establish the two-part analysis set forth in the Court of Appeals' opinion. Cf. *Katz* v. *United States*, 194 F. 3d 962, 967 (CA9 1999); see *supra*, at 17-18. However, a few words about the proper formulation of such a test are in order, in case this Court should adopt such an analysis in the present case.

A two-part analysis would bear considerable resemblance to the habeas analysis under 28 U. S. C. § 2254(d)(1) explained last term in *Terry Williams* v. *Taylor*, 529 U. S. __, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). The first step, identification of the "clearly established" governing rule, would be the same. See *id.*, at 429-430, 120 S. Ct., at 1523. The second step, however, would be broader, *i.e.*, providing more latitude to public officials faced with personal liability than is allowed for a challenge to an arguably wrong criminal judgment.

Williams disapproved the "reasonable jurist" standard in the habeas context. See *id.*, at 428, 120 S. Ct., at 1522. For immunity, though, the protection for officials must be *at least* that broad. If a reasonable judge could believe that a particular use of force under given circumstances was legal, it necessarily follows a reasonable police officer could reach the same conclusion. See *supra*, at 19.

Where the rule of law involves a "reasonableness" element, the second step may involve a second-stage "reasonableness" inquiry. For example, the prejudice element of ineffective assistance in *Williams* did not turn on the original question of "reasonable probability" of a different result from *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). Instead, the question was whether the state court's application of this standard to the facts of the case was reasonable. See *Williams*, *supra*, 146 L. Ed. 2d, at 431, 120 S. Ct., at 1524 (opinion of O'Connor, J.). Mere disagreement on the original "reasonable probability" assessment would not have been enough. See *id.*, at 428-429, 120 S. Ct., at 1522.

Similarly, applying the general rule of "reasonable force" to the facts of particular cases very often leaves room for reasonable disagreement over whether the line has been crossed. The policies underlying qualified immunity require that such disagreements be resolved in favor of the officer, and that the defense be available on summary judgment. See *Harlow*, *supra*, 457 U. S., at 815-816 (rejecting subjective inquiries as

incompatible with the goal of resolving immunity claims on summary judgment).

A change to a two-part analysis would soften the requirement that the "clearly established" right be "particularized." See *supra*, at 13; *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). The protection formerly provided in the particularization requirement would be moved into the second, "unreasonable application" step. If the Court does decide to make this change, *amicus* suggests that it be quite explicit that this is a change in form but that no reduction in the degree of protection is intended. Language in earlier cases based on the single-part, particularized right analysis would have to be reexamined. For example, *Harlow*, *supra*, 457 U. S., at 818-819, states, "If the law was clearly established, the immunity defense ordinarily should fail . . . ." That would no longer be true under the two-part analysis. A clearly established but general rule of law would not defeat the defense, but merely move the analysis to the second step.

In the present case, either analysis brings us to the same result. We begin with the premise that Parker and Saucier's decision to arrest Katz was either legal or within the perimeter of qualified immunity. See *supra*, at 2. There is no particularized rule which necessarily precluded the amount of force used to effectuate this arrest, and hence Saucier prevails under the traditional one-step *Harlow/Anderson* approach. See part III, *supra*. Under a two-part approach, properly applied, the question would be whether an officer could reasonably *believe* that the amount of force used was on the legal side of the *Graham* v. *Connor* line. This is a very different question from whether it actually *was* on the right side of the line. Cf. *Williams* v. *Taylor*, *supra*, 146 L. Ed. 2d, at 428-429, 120 S. Ct., at 1522. For the same reasons discussed in part III, *supra*, Private Saucier comes within the perimeter of qualified immunity.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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